February 13, 2003

Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Jonathan Adelstein
Commissioner Michael Copps
Commissioner Kevin Martin
Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C.

Re: CC Docket Nos. 01-338, 96-98, 98-147, and 02-33

Dear Chairman Powell; Commissioners Abernathy, Adelstein, Copps, and Martin; and Secretary Dortch:

The Indiana Utility Regulatory Commission is filing this supplemental *ex parte* letter in the FCC's UNE Triennial Review proceeding to discuss some general concerns about the level of state authority and flexibility to modify the FCC's national UNE list, as well as several issues surrounding the treatment of broadband and advanced services in this proceeding.

In general, we request that for all UNEs, including UNE-P, regardless of geography or UNE zone, if a State Commission does not have explicit authority under state law, and if that State determines that impairment does exist, there must be a process in place for that State Commission or CLECs to petition the FCC to challenge that finding of non-impairment or finding that a particular UNE should not be on a national UNE list.

Additionally, we address the following concerns:

(1) ILECs should be required to offer both line sharing and line splitting to CLECs. An ILEC should not be able to restrict availability of the HFPL to CLECs to only those instances in which that ILEC is the voice carrier.[1]

[1] This concern is based upon testimony in the IURC's TELRIC subdocket for a large ILEC in Indiana and not on mere speculation.

(2) ILECs should be required to make Next Generation Digital Loop Carrier (NGDLC) systems available to CLECs either (A) as an end-to-end platform (both data/ broadband and/or, where applicable, voice) from the central office or wire center to the customer's premises or (B) on an unbundled basis. The entire hybrid copper/fiber loops of such NGDLC systems should be made available as a loop (all the way from the central office or wire center to the customer's Network Interface Device (NID) and as individual subloops within that loop (including feeder components of the loop). CLECs should not be required to establish a separate interconnection point for each individual customer; splice points should be made available at an aggregated level within the feeder to allow CLECs more efficient access to multiple customers. Finally, CLECs should be given access to the remote terminals, the Optical Concentration Device and other packet switching functions.

In any case, the FCC should not create special exemptions from unbundling requirements simply because there is a packet switching component or a remote switching component or an optical fiber component of NGDLC systems. In the next few years, the IURC anticipates that NGDLC systems or other packet switching architectures will become more and more ubiquitous as the ILECs begin migrating their own retail customers – both voice and broadband - to those network architectures. It will become difficult, if not impossible, to separate voice and "data" traffic or to say that a particular network element or component is used to serve only voice customers or only "data" or non-voice customers. This joint use of ILEC facilities will heighten the need mentioned elsewhere for the FCC and the states, through a federal-state joint board, to fully consider all aspects of identifying, classifying, assigning, allocating, and recovering ILEC costs and expenses.

(3) An ILEC holding company should not be allowed to maintain a corporate structure that, simply by virtue of the corporate structure, allows the different subsidiaries of that holding company to avoid making products and services available on either an unbundled basis or a resale basis (at a wholesale discount);

(4) The FCC must consider the relationship between the unbundling obligations it establishes or removes, the classification of ILEC services or ILECs, and the identification, assignment/allocation, and recovery of costs. The FCC should not eliminate or limit the ILECs' obligations to make broadband or advanced services available to their own retail customers or to CLECs under Sections 251 or 271 based upon the classification of the affected services or components thereof (e.g., "non-regulated," "deregulated," detariffed, "Title I," "information services," or "telecommunications components" of an information service) or the ILEC (e.g., as a non-dominant carrier) without first ensuring that unregulated or nonregulated costs and expenses are not assigned to, allocated to, or recovered from, customers of regulated services and that the allocation and recovery are – at a minimum – consistent with Parts 64, 36, and Section 254(k) under applicable case law (e.g., Smith v. Illinois Bell). These issues cross jurisdictional boundaries; thus, the

FCC should refer these issues to a federal-state joint board for analysis and for an initial recommendation(s) to the FCC.

> This classification will affect whether ILECs have an unfair competitive advantage over CLECs and cable modem or cable telephony providers, and whether customers of regulated services and products or of universal service (under Section 254(k)) are forced to subsidize customers of the ILECs' nonregulated services or to otherwise recover costs associated with those services. ILEC holding companies that own cable television systems, satellite systems, ISPs, or other non-wireline assets may also have an incentive to shift the costs associated with those non-wire line facilities, plant, and equipment to the wireline network or to customers of regulated services.

All of these concerns will be magnified if the facilities used to carry broadband or advanced services are also used to carry voice traffic. It is difficult – if not impossible – to distinguish between "voice" and "data" packets. Indeed, one possible construction of the word "data" would result in the classification of **all** packets as "data". Where the same facilities are used to carry both voice and non-voice traffic, it would likely be necessary to allocate the investment in such jointly used facilities between regulated and nonregulated categories (Part 64). Where the same facilities are used to carry both regulated interstate and intrastate traffic, it will be necessary to allocate investment, costs, and expenses between the interstate and intrastate jurisdictions (Part 36)

In Paragraph 83 of the *Notice*[2], the FCC stated:

> ". . . Section 254(k) also requires that services supported by universal service bear no more than a reasonable share of joint and common costs of the facilities used to provide these services. Because information services do not currently fall within the definition of services supported by universal service, deeming wireline broadband Internet access to be an information service would mean that the Commission would have to ensure that the costs of the network are properly allocated between regulated Title II services and Title I information services to comply with this statutory mandate."

We agree with the FCC's conclusions in this paragraph. The FCC may also need to consider the requirements under Section 254(k) under other scenarios, as well – i.e., any classification of broadband or advanced services other than as universal service could trigger the 254(k) requirements, even if there is no classification to Title I, *per se*.

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[2] *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers;* CC Docket No. 02-33; *Computer III Further Remand Proceedings: Bell Operating Company Provisions of Enhanced Services; 1998 Biennial Review – review of Computer III and ONA Safeguards and Requirements,* CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking (rel. Feb. 15, 2002) (*"Notice"*).

To summarize, while we recognize that the primary purpose of this proceeding is to determine the ILECs' unbundling obligations (or to establish a process for making such a determination), we are raising these concerns about regulatory classifications, cost allocation and recovery, and subsidization to point out some of the interactions between these issues and unbundling and to caution the FCC not to remove or limit the ILECs' unbundling obligations prior to determining, together with the states, the impact of and upon the FCC's rules – principally Part 64 and Part 36 and, where applicable, Part 32; as well as other controlling legal authorities – e.g., Section 254(k) and the United States Supreme Court's decision in *Smith v. Illinois Bell*.

Very truly yours

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William D. McCarty, Chairman

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David W. Hadley, Commissioner

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Larry Landis, Commissioner

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Judith G. Ripley, Commissioner

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David E. Ziegner, Commissioner